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California Fair Political Practices Commission

November 10, 1993

Richard M. Frank
Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-9555

Re: Your Request for Advice
Our File No. A-93-410

Dear Mr. Frank:

This is in reply to your request for advice on behalf of the Delta Protection Commission ("DPC") concerning whether the conflict-of-interest provisions of the Political Reform Act¹ apply to certain members of the DPC.²

QUESTION

The Delta Protection Act (Public Resources Code Section 29700 et seq.) requires that five members of the DPC be from the boards of directors of reclamation districts within the Sacramento-San Joaquin Delta. By law, certain board members of reclamation districts require their board members to own or represent significant real property interests in their district. Will these members' participation in DPC decisions which financially affect the real property which they own or represent in the reclamation

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Normally we do not provide formal written advice under Section 83114(b) to or on behalf of unnamed officials. (See Regulation 18329(b)(1)(A).) However, your request for advice is unique in that it arises due to the specific government positions certain DPC officials must hold in order to be on the DPC. Because every DPC member who holds one of these positions in the future will have the same concerns about application of the Political Reform Act to them, we believe it is in the best interests of your client and the Political Reform Act to extend the immunity of Section 83114(b) to those DPC members, subject of course to the conditions set forth in this letter.

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district create a conflict of interest under the Political Reform Act?

CONCLUSION

DPC reclamation district members whose reclamation district require them to own or represent real property in the reclamation district will have no conflict of interest when they participate in DPC decisions which financially affect their real property or the real property they represent in the reclamation district, so long as the DPC decisions affect that real property in either the same or proportionately the same manner as a significant segment of the real property in the member's reclamation district.

FACTS

The Delta Protection Act (Public Resources Code Sections 29700 et seq.) establishes the DPC as a land use planning body with jurisdiction over a multi-county region encompassing the Sacramento-San Joaquin Delta.

The purposes of the DPC are to protect the Delta environment, conserve Delta lands and improve flood protection. (Public Resources Code Section 29702.) The DPC's jurisdiction is primarily to plan rather than regulate. Its principal responsibilities are to make findings regarding the consistency of local governments' conforming general plan amendments with the Delta Resource Management Plan (Public Resources Code Section 29763.5); and to hear any appeals of local government land use decisions brought to the DPC. (Public Resources Code Sections 29770-29771.) The Delta Protection Act specifically states that the DPC shall have no direct regulatory authority (Public Resources Code Section 29764); instead, the Delta Resource Management Plan shall be implemented through local governments' general plans.

The membership of the DPC is set forth in Section 29735 of the Public Resources Code. Public Resources Code Section 29735 provides that the DPC is to be composed of 19 voting members:

-five county supervisors (one each from the five counties included within the Delta);

-three city councilmembers from municipalities within the Delta;

-five members selected from the boards of directors of five different reclamation districts within the Delta. Each of these members must by statute be a resident of the Delta, and have been elected to the designated board of directors by the trustees of the given reclamation district;

-six state officials: the Director of Parks and Recreation; the Director of Fish and Game; the Director of Food and

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Agriculture; the State Lands Commission's Executive Officer; the Director of Boating and Waterways; and the Director of Water Resources (or their designees).

The DPC also has two ex officio (i.e., non-voting) members from the Legislature, one from the State Assembly, the other from the State Senate. (Public Resources Code Section 29740.)

DISCUSSION

Section 87100 prohibits public officials, such as members of the DPC, from making, participating in or using their official positions to influence a governmental decision in which they have a financial interest.

Section 87103 states that an official has a financial interest in a governmental decision if:

[I]t is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

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For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

(Emphasis added.)

It is, of course, impossible to assess at this point whether some future DPC decision in which a reclamation district member participates will have a material financial effect on that official's economic interests.³ However, your question assumes that many DPC decisions will affect the real property of, or represented by, the reclamation district members by virtue of their legally required ownership of real property in their districts. On this basis, you ask whether Section 87103's "public generally" exception applies.

In September 1993, the Commission amended Regulation 18703 and adopted Regulations 18703.2 and 18703.3, all of which were meant to interpret and implement the "public generally" exception stated in Section 87103.

For purposes of your question, we do not believe Regulations 18703 or 18703.2 directly apply. However, depending on the effects of particular decisions made by the DPC, Regulation 18703.3 will apply to exempt the reclamation district members from the Political Reform Act's conflict-of-interest provisions in making those decisions.

Regulation 18703.3 (copy enclosed) conditionally applies Section 87103's "public generally" exception to public officials who, by law, are appointed to a governmental board or commission to represent a specific economic interest on that body. If the conditions of the regulation are met, then the public official does not have a conflict of interest under the Political Reform Act. This applies only to governmental decisions that have a financial effect on the economic interest the official was appointed to represent. The intent of this regulation is to allow these officials to represent the interests that the law intended.

For the "public generally" exception of Regulation 18703.3 to apply, generally, four criteria must be met:

³ To determine whether a particular governmental decision's effect on an official's economic interest will be "material," see Commission Regulations 18702-18702.6.

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1. The statute creating the board or commission either specifically or impliedly provides that the members appointed thereto are to represent and further the interests of a specific economic group or interest. (Regulation 18703.3(a)(1) and (b).)
2. The member in question is required to have the economic interest the member represents. (Regulation 18703.3(a)(2).)
3. Except for the economic interest the member represents, the government decision in question has no material financial effect on any other economic interest held by the member. (Regulation 18703.3(a)(3).)
4. The government decision financially affects the member's required economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent. (Regulation 18703.3(a)(4).)

Based upon the applicable provisions of the Water Code and Public Resources Code and the facts you present, we believe Regulation 18703.3 applies to DPC decisions in which DPC reclamation district members participate so long as the financial impact of the decisions on the real property they were appointed to represent is substantially the same or proportionately the same as the financial impact on the real property of a significant segment⁴ of the reclamation district the members were appointed to represent. However, the regulation will not apply where a DPC decision affects an economic interest of a reclamation district member of the DPC that is different from the economic interest that member was appointed to represent. These criteria are set forth in subdivisions (a)(3) and (a)(4) of Regulation 18703.3 and cannot be addressed absent specific facts.

The issue you raise is primarily directed at subdivisions (a)(1) and (a)(2) of Regulation 18703.3. If these criteria are satisfied, then the exception in the regulation can be applied to reclamation district members of the DPC. Thus, only when the DPC decision has a unique or non-proportional financial effect on a reclamation district member's economic interests will Regulation 18703.3 not apply.

The law governing reclamation districts (Water Code Sections 50000-53901) contains the following provisions: Water Code Section 50600 requires that the first board of trustees of a

⁴ By "significant segment," we look to Regulation 18703(a) (copy of regulation enclosed) which, *inter alia*, states that ten percent or more of all property owners in a district or fifty percent or more of all businesses in a district are a significant segment.

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reclamation district consist of only district landowners or their legal representatives. Water Code Section 50601 permits reclamation district by-laws to require that all trustees elected after the first district board be district landowners or their legal representatives. Finally, Water Code Section 50704 generally gives each district landowner one vote in board elections for each acre of land owned. Based upon these provisions, it is apparent the Legislature intended that reclamation district landowners have either a disproportionately large share of control or, where the district chooses, total control over reclamation district governance in order to control the use of their real property and the impact thereon caused by reclamation district board decisions.

The Public Resources Code provisions containing the Delta Protection Act (Public Resources Code Sections 29700-29780) continue this theme. The purposes of the Delta Protection Act are to protect the Delta environment, conserve Delta lands and improve flood protection. (Public Resources Code Section 29702.) The DPC's primary tasks are to adopt a Delta Resource Management Plan (Public Resources Code Section 29760), to make findings regarding the consistency of local governments conforming their general plans with the Delta Resources Management Plan (Public Resources Code Section 29763.5) and to hear appeals of local government land use decisions brought to the DPC (Public Resources Code Sections 29770-29771). To accomplish these tasks, the Delta Protection Act establishes the DPC, which consists of 19 voting members, 13 of whom represent various governmental agencies within the Delta region. Of these 13 members, five are appointed to the DPC from the boards of trustees of five different reclamation districts within the Delta region (Public Resources Code Section 29735.) As with the provisions of the Water Code establishing reclamation districts, it is apparent in the Delta Protection Act that the Legislature intended reclamation district landowners who would be affected by decisions of the DPC, or their representatives, to directly participate in these decisions.

On the basis of these statutory provisions, we conclude that there is an implicit finding in these statutes that reclamation district members who are required to own or represent real property in their reclamation districts are appointed to the DPC to represent real property interests that would be affected by DPC decisions. Accordingly, the requirements of subdivisions (a)(1) and (b) of Regulation 18703.3 are met.

For these same reasons, the criteria of subdivision (a)(2) of the regulation are met. DPC reclamation district board members who are required to own or represent real property in their reclamation districts serve on the DPC because they own or represent real property that may be affected by DPC decisions.

As mentioned, absent specific facts, we cannot state whether Regulation 18703.3 will apply to exempt DPC reclamation district members from the Political Reform Act's conflict-of-interest


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prohibitions in every situation. (See subdivisions (a)(3) and (a)(4) of Regulation 18703.3.) Nevertheless, the regulation will apply so that DPC reclamation district members will not be inhibited from participation in a DPC decision solely due to the decision's financial impact on real property in the district they are required to own or represent which is similar to the financial impact on the other real property in his or her district.

Sincerely,

Steven G. Churchwell
General Counsel


By: Scott Hallabrin
Assistant General Counsel

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Enclosures